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District Court

MAY 10 2006

For The Northern Mariana Islands
By _____
(Deputy Clerk)

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16 IN THE UNITED STATES DISTRICT COURT FOR
 17 THE NORTHERN MARIANA ISLANDS

18 ROSARIO DLG KUMAGAI,) CIVIL ACTION NO. 05-0037

19 Plaintiff,)

20 vs.)

21 PAMELA BROWN, a.k.a. PAMELA BROWN)

22 BLACKBURN, personally and in her official)

23 capacity as the Attorney General for the)

24 Commonwealth of the Northern Mariana Islands;)

25 FERMIN M. ATALIG, personally and in his)

26 official capacity as the Secretary of Finance,)

27 COMMONWEALTH OF THE NORTHERN)

28 MARIANA ISLANDS;)

29 MARIA LOURDES SEMAN ADA, personally)

30 and in her official capacity as the Executive)

31 Director for the Commonwealth Development)

32 Authority;)

33 COMMONWEALTH DEVELOPMENT)

34 AUTHORITY;)

35 BANK OF GUAM;)

36 and JOHN DOES ONE thru TEN,)

37 Defendants.)

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44	7 CMC §3401	8
45		

1	42 USC §1983	11-12, 15, 20, 22
2	42 USC §1985(3)	22
3		

4 **Rules**

5	Rule 56(c) of the Federal Rules of Civil Procedure	1
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7 **Authorities**

8	Article III, §11 of the Constitution of the CNMI	18
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9	Public Law 15-02	4
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10	Restatement of Torts 2d, §46, cmt. d (1965)	25
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11	Restatement of Torts 2d, §766	23
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12	Restatement of Trusts 2d, (1959) §126, §200	8
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13	Restatement of Trusts 2d, §126, cmt. (a) (1959)	9
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14	Restatement of Trusts 3d, §48	8
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15	Restatement of Trusts, (1935) §126	8
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STANDARDS FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

On a motion for summary judgment the moving party does not bear the burden of providing evidence negating the elements of plaintiff's claim. Celotex Corp. v. Catrett, (1986) 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548. In opposing a motion for summary judgment the party bearing the burden of proof must show evidence raising a triable issue of fact. The evidence presented in opposition to the motion must be sufficient to meet the relevant standard of proof on the particular claim. Anderson v. Liberty Lobby, Inc., (1986) 91 L.Ed.2d 202, 477 U.S. 242, 106 S.Ct. 2505. In a civil rights case alleging conspiracy, the moving party does not bear the burden of furnishing evidence negating the existence of a conspiracy; the non-moving party bears the burden of showing evidence from which a reasonable jury could conclude that a conspiracy existed. United Steelworkers of America v. Phelps Dodge Corp., 865 F.2d 1539, 1541-1543 (9th Cir. 1989) (En Banc). Conclusory statements of discriminatory intent are insufficient to avert summary judgment. Magana v. Commonwealth of the Northern Mariana Islands, 107 F.3d 1436 at 1448 (9th Cir. 1997).

BACKGROUND

In PL 13-17, the CNMI Legislature found: "that the Commonwealth currently owes to its citizens approximately [\$40 million] for land acquired by eminent domain or other legal process," and authorized public debt up to \$40 million to settle these claims. (PL 13-17 §2.) PL 13-17 was

1 then amended by PL 13-25, 13-39, and 13-56, in various respects.¹ Originally the Bonds were to be
 2 issued by the Marianas Public Lands Authority (MPLA). (PL 13-17 §§2 and 3.) In the final version,
 3 the Bonds were to be issued by the Commonwealth Development Authority (CDA) pursuant to PL
 4 11-3 codified at 4 CMC §10451 et seq. (PL 13-39 §2.) Also, the legislation originally provided for
 5 the Bond proceeds to be paid to MPLA. (PL 13-39 §3(d), 4 CMC §4743(d).) This was modified
 6 by PL 13-56 §5 and 14-29 §1(c), to provide for the net proceeds to be retained by the “CDA
 7 appointed trustee, pursuant to PL 11-3,” and for concurrence of the Secretary of Finance to draw
 8 downs. Complaint, Ex.B, pp2-3. Finally, up to \$11 Million of the debt was allocated to fund the
 9 construction of a prison , reducing the amount available for land compensation. (PL 13-56 §§3
 10 and 4.)

13 Under PL 11-3 CDA has a central role concerning issuance of bonds. “The [CDA] shall act
 14 as the instrument of the Commonwealth for purposes of issuing the bonds for and in the name and
 15 on behalf of the Commonwealth ...”, 4 CMC §10452. Virtually everything done by the
 16 Commonwealth in the issuance of its bonds under PL 11-3 is done by the CDA. CDA has a variety
 17 of substantive powers, including the power to “appoint” and to “authorize and empower” trustees
 18 (4 CMC §10462), and of “arranging for ... documents and instruments deemed required ...” (4
 19 CMC §10455). Under its enabling legislation CDA also has the power “to act as a financial advisor
 20 and coordinator with respect to any public borrowing by the Commonwealth ...” 4 CMC
 21 §10203(a)(27). “Notwithstanding any other provision of law, no bonds ... may be issued ... by the
 22 Commonwealth ... without the approval of Commonwealth Development Authority.” 4 CMC
 23

24
 25
 26 ¹PL 13-17, 13-25, and 13-39 were codified as the Land Compensation Act of 2002, 2 CMC Div. 4 §4741 et.
 27 seq., however, the 2004 published Revision of the Commonwealth Code does not reflect the amendments
 in PL 13-56, or those in PL 14-29 discussed below. Copies of all five laws are included in the appendix.

1 §10203(a)(27). The CDA has the power “to make contracts and execute all instruments necessary
 2 or convenient in the exercise of the powers of the authority.” 4 CMC §10203(a)(17).

3 The Bonds were issued by the CDA under an Indenture, which is a contract between the Bank
 4 and the CDA “acting for and on behalf of the Commonwealth”. Indenture, p.1. Declaration of
 5 Amoretta L.P. Carlson (“Carlson Decl.”), Ex.A. The MPLA is not itself a party to the Indenture.
 6 The Indenture governs the obligations of the Commonwealth to the Bondholders. Section 4.01 of
 7 the Indenture provides consistent with CNMI law:²

8
 9 The Bonds are a debt of the Commonwealth and the full faith and credit of the
 10 Commonwealth government pursuant to the Law are pledged to the punctual
 11 payment of the principal of and interest on the Bonds as the same shall become
 12 due ...

13 The MPLA confirmed the Bonds were obligations of the CNMI not MPLA in a resolution
 14 concerning the Bonds. Carlson Decl., Ex.B.

15 The net proceeds of sale of the Bonds were to be deposited by the Trustee to the extent of
 16 \$28,000,691.00 “in the MPLA account ... and \$9,104,694.00 in the Prison account ...” Indenture,
 17 §3.01. The obligations as to “land compensation claims” to be paid from the MPLA fund are
 18 obligations of the Commonwealth and not of the MPLA (PL 13-17 §2; Indenture, §3.02).

19 By law and the Indenture a portion of fuel tax revenues assessed by and payable to the
 20 Commonwealth under 4 CMC §1403 are paid by the Commonwealth to a Land Compensation Fund,
 21 and disbursed by the Trustee for the payment of certain expenses as well as payment of the Bonds.
 22 See Indenture, Definitions “Land Compensation Fund”, Indenture, p.6; Indenture, §4.02; PL 13-17
 23 §4; PL 13-39 §§3 and 4, 4 CMC §1803(e), 2 CMC §4743.

26
 27 ²See 2 CMC Div. 4 §4742, as amended by PL 13-56 and 14-29, 4 CMC §§10451(a)-(c), 10452, 10460(c) and
 10461(b).

1 In sum, the Bonds were issued by the Commonwealth through the CDA, not by MPLA. The
2 CDA on behalf of the Commonwealth, not the MPLA, contracted with the Bank. The property held
3 by the Bank under the Indenture (including in the MPLA account) is property of the Commonwealth
4 not the MPLA. The obligations associated with the Indenture to pay the Bonds and Land
5 Compensation Claims are obligations of the Commonwealth not the MPLA. As discussed in
6 Section I infra the obligations of the Bank under the Indenture are to the Bondholders and the
7 Commonwealth, not the MPLA or specific land claimants.

8
9 Each of the other Defendants in this action as well as non-Defendant MPLA is an officer or
10 agency of the Commonwealth. The MPLA no longer exists having been abolished by the
11 Commonwealth on February 22, 2006 by PL 15-02.³

12
13 The Bonds were issued in late 2003. Under the law then in effect, wetlands were to be
14 compensated from bond proceeds only after lands taken for certain other purposes were
15 compensated. Complaint, ¶18. On September 21, 2004 well after the Bonds were issued, Governor
16 Babauta signed into law PL 14-29. Plaintiff contends that the effect of PL 14-29 was to remove the
17 prioritization so wetlands were compensable on the same basis as other lands. Complaint, ¶19, Ex.B.
18 The Attorney General contended instead that the effect of PL 14-29 was that wetlands could not be
19 compensated at all from bond proceeds unless for rights of way. See, Complaint, CNMI, ex rel.
20 Pamela Brown, Attorney General v. MPLA, et al., Civil Action 05-0332E (“the MPLA Lawsuit”),
21 alleged in the Complaint in this action, ¶35, Ex.R.⁴ PL 14-29 §(1)(b) also provided a valuation date

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24
25 ³It was originally established by PL 12-33 and 12-71.

26 ⁴As alleged in the Complaint herein the Attorney General filed that action on August 15, 2005 against
27 Plaintiff and another landowner, Victoria S. Nicholas. On September 22, 2005, Judge Wiseman dismissed
28 the case as to Kumagai on the basis that Brown was barred by a prior settlement in an earlier case, Civil

1 for purposes of determining compensation. In his message signing PL 14-29 into law, Governor
 2 Babauta noted that the effect of using this valuation date was likely to make the Bond proceeds
 3 insufficient to pay all compensation claims.⁵ Complaint, Ex.B, p.2.
 4

5 The only specific allegations in the Complaint in this action that even relate to the Bank
 6 appear in paragraphs 32 through 34, and in substance are that on August 9, 2005 Defendants CDA
 7 and Ada delivered MPLA Requisition No. FY05-11 to the Bank after Defendant Atalig's
 8 concurrence therein, but on the same day CDA instructed the Bank not to process the requisition and
 9 that the Bank complied with such instructions. The CDA acted based on request of the Attorney
 10 General Brown who expressed concern as to legality of the disbursement as authorized by MPLA
 11 in the requisition. Complaint, Ex.Q. The Bank believed itself instructed to stop, that the instruction
 12 was within CDA's authority and that it was proper to comply. Declaration of Amoretta L.P. Carlson
 13 ¶¶7-8 ("Carlson Decl.").

14 Although not disclosed in the Complaint, on October 3, 2005, CDA again directed the Bank
 15 of Guam to process the requisition for payment to Kumagai and to the CNMI Treasury,⁶ which the
 16 Bank of Guam did. Carlson Decl., ¶11. Accordingly, Plaintiff was paid the sums specified by the
 17 requisition.
 18

19 Action No. 05-0149C ("the CHC Lawsuit"). Complaint herein, Ex.F, ¶38, Ex.U. Judge Wiseman allowed
 20 the case on the issue of compensability of wetlands to continue against Mrs. Nicholas. In a decision entered
 21 on February 10, 2006 after this suit was filed Judge Wiseman held wetlands compensable and dismissed the
 22 case as to Mrs. Nicholas. A copy of that decision is included in the Appendix.

23
 24 ⁵The Indenture contemplates amendments to the laws authorizing the bonds. See, Definition, "Bond Act,"
Indenture, p.2. Under PL 11-3, 4 CMC §10453(c), the use of bond proceeds may be changed by legislation.
 25 Section 7.01 of the Indenture provides that it may be amended. It does not appear that anyone challenged
 26 the validity of PL 14-29 on the basis that it was enacted after the bonds were actually issued.

27
 28 ⁶This action by CDA apparently followed Judge Wiseman's decision in favor of Kumagai in the MPLA
 Lawsuit, *supra*, f/n5.

1 The Complaint alleges a variety of activities on the part of the public defendants but not the
2 Bank in this action over a period of months preceding the August 9, 2005 instruction to the Bank to
3 withhold processing. The Complaint does not allege the participation by the Bank in any manner
4 in these activities, other than through conclusory allegations of conspiracy. Under the Indenture and
5 in practice, the Bank did not have involvement in, responsibility for, or information concerning these
6 matters or the substantive aspects of land compensation settlement. Carlson Decl., ¶¶12-14, 18-19.

7 Plaintiff has contended that other wetland owners were compensated while she was not. The
8 relevant chronology with respect to the specific payments alleged in paragraphs 39 and 40 of the
9 Complaint as it pertains to the Bank is set out in the Declaration of Amoretta Carlson submitted
10 herewith. None of the requisitions for these payments disclosed the wetland or non-wetland
11 character of any of the property subject thereto. Many covered additional properties not alleged to
12 be wetlands. None of the requisitions were processed during the period between August 9, 2005
13 when the Bank was instructed not to process Requisition No. FY05-11 for payment to Plaintiff
14 Kumagai, and October 3, 2005 when the CDA again directed Bank of Guam to process Kumagai's
15 requisition; all were processed either well before or subsequent to such period. See, Carlson Decl.,
16 ¶¶15-17. Accordingly, the Bank did not even unwittingly process payments to other wetland owners
17 while complying with CDA's instruction as to Plaintiff's requisition.

18 **I. THE BANK PROPERLY FOLLOWED CDA's INSTRUCTION NOT TO
19 PROCESS THE REQUISITION.**

20 (a) **The Plaintiff Was Not a Beneficiary of the Indenture, and Had No
21 Rights Against Bank of Guam or Interest in Funds in the Bank's
22 Possession under the Indenture.**

The preamble to the Indenture provides “the Authority does hereby covenant and agree with the Trustee, for the benefit of the respective owners from time to time of the Bonds, as follows . . .”

Section 1.02 of the Indenture provides in part:

... this Indenture shall be deemed to be and shall constitute a contract between the Authority, on behalf of the Commonwealth, and the Owners from time to time of all Bonds issued hereunder and then Outstanding to secure the full and final payment of the interest on and principal of all Bonds authorized, executed, issued and delivered hereunder, subject to the agreements, conditions, covenants and provisions herein contained.

Accordingly, the contracting parties are the Commonwealth through the CDA, the Bond holders and the Trustee.

Section 10.02 of the Indenture provides:

Nothing in this Indenture, expressed or implied, is intended to give to any person other than the Commonwealth, the Authority, the Trustee, the Paying Agent and the Owners any right, remedy or claim under or by reason of this Indenture. Any covenants, stipulations, promises or agreements in this Indenture contained by and on behalf of the Authority, the Commonwealth or any legislator, official (elected or appointed), member, officer or employee thereof shall be the sole and exclusive benefit of the Trustee and the Owners.⁷

The Trustee has obligations to the Commonwealth, and the CDA as the Commonwealth's agent under the Indenture, since the property the Bank holds under the Indenture belongs to the Commonwealth, the claims for land acquisition to be paid from the Bonds are obligations of the Commonwealth, and the Commonwealth through the CDA is the issuer of the Bonds and the sole party with the Bank to the Indenture (other than the Bondholders).

⁷“Owners” in the foregoing provisions and elsewhere in the Indenture means Owners of the Bonds, not Owners of property taken by the CNMI. The “Authority” is the CDA. See, Definition of “Owner” and “Authority”, Indenture, p.2. The “Paying Agent” performs functions related to disbursements to Bondholders and not disbursements to Land Compensation Claimants. Indenture, §4.05, Definitions “Paying Agent”, p.7.